## APPENDIX A

### UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

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| UNITED STATES OF AMERICA<br>*v.*<br>WILLIAM WALTER REMINGTON,<br>*Defendant.* | Indictment<br>C —— |

The Grand Jury charges:

1. On or about January 24, 1951, in the Southern District of New York, WILLIAM WALTER REMINGTON, the defendant herein, having duly taken an oath as a witness in a competent tribunal, to wit, the United States District Court for the Southern District of New York, at the trial of a criminal cause entitled, *United States* v. *William Walter Remington,* Indictment C 132-344, that he would testify truly, did lawfully, wilfully, and knowingy, and contrary to said oath, state matters which he did not believe to be true, that is to say:

2. At the time and place aforesaid, the Court and Jury were engaged in the trial of the aforementioned indictment, wherein WILLIAM WALTER REMINGTON, the defendant herein, was charged with having committed perjury when he testified falsely and contrary to an oath before a Grand Jury sitting in and for the Southern District of New York, in denying that he had ever, at any time, been a member of the Communist Party.

3. Whether or not WILLIAM WALTER REMINGTON had ever attended Communist Party meetings was a matter material to said trial.

4. At the time and place aforesaid, WILLIAM WALTER REMINGTON, appearing as a witness under oath, testified

falsely before said Court and Jury with respect to the aforesaid material matter, as follows:

"Q. Have you ever to your knowledge attended Communist Party meetings? A. No."

The aforesaid testimony of WILLIAM WALTER REMINGTON, as he then and there well knew and believed, was untrue (Title 18, Section 1621, United States Code).

COUNT II

The Grand Jury further charges:

1. At the time and place aforesaid, as more fully set forth in paragraphs 1 and 2 of Count I herein, the allegations of which are incorporated herein, the defendant, WILLIAM WALTER REMINGTON, appearing at the aforementioned trial, and being under oath, as aforesaid, testified falsely.

2. Whether or not WILLIAM WALTER REMINGTON ever gave to anyone not entitled thereto information to which he had access by reason of his employment by the United States Government was a matter material to said trial.

3. At the time and place aforesaid, WILLIAM WALTER REMINGTON, appearing as a witness under oath, testified falsely with respect to the aforesaid material matter, as follows:

"Q. Did you ever give Miss Bentley or anyone else any secret classified information or any information to which they were not entitled? A. I definitely did not.

Q. Did you ever give such information to anyone for the purpose of having it sent to Russia? A. No.

Q. Or did you ever give such information to anyone for any other purpose? A. No, I did not."

The aforesaid testimony of WILLIAM WALTER REMINGTON, as he then and there well knew and believed, was untrue in that he gave to Elizabeth T. Bentley material and information obtained by him by reason of his employment by the United States Government, and to which the said Elizabeth

T. Bentley was not entitled (Title 18, Section 1621, U. S. C.).

## COUNT III

The Grand Jury further charges:

1. At the time and place aforesaid, as is more fully set forth in paragraphs 1 and 2 of Count I herein, the allegations of which are hereby repeated and realleged herein, WILLIAM WALTER REMINGTON, the defendant herein, appearing at the aforementioned trial as a witness and being under oath as aforesaid, testified falsely.

2. Whether or not WILLIAM WALTER REMINGTON had ever paid Communist Party dues was a matter material to said trial.

3. At the time and place aforesaid, WILLIAM WALTER REMINGTON, appearing as a witness under oath before said Court and Jury, testified falsely with respect to the aforesaid material matter, as follows:

"Q. Have you ever paid Communist Party dues? A. I have not."

The aforesaid testimony of WILLIAM WALTER REMINGTON, as he then and there well knew and believed, was untrue (Title 18, Section 1621, United States Code).

## COUNT IV

The Grand Jury further charges:

1. At the time and place aforesaid, as more fully set forth in paragraphs 1 and 2 of Count I, the allegations of which are hereby repeated and realleged herein, WILLIAM WALTER REMINGTON, the defendant herein, appearing at the aforementioned trial and being under oath as aforesaid, testified falsely.

2. Whether or not WILLIAM WALTER REMINGTON had ever asked anyone to join the Communist Party was a matter material to said trial.

3. At the time and place aforesaid, WILLIAM WALTER REMINGTON, appearing as a witness under oath, testified falsely with respect to the aforesaid material matter, as follows:

"Q. Did you ever ask anybody to join the Communist Party, Mr. Remington * * *? A. No, I didn't.
Q. You are sure and you are positive of that? A. Positive."

The aforesaid testimony of WILLIAM WALTER REMINGTON, as he then and there well knew and believed, was untrue (Title 18, Section 1621, United States Code).

## COUNT V

The Grand Jury further charges:

1. On or about the 25th day of January, 1951, at the Southern District of New York, WILLIAM WALTER REMINGTON, the defendant herein, having duly taken an oath in a competent tribunal, to wit, the United States District Court for the Southern District of New York, at the trial of a criminal cause entitled, *United States* v. *William Walter Remington,* Indictment C 132-344, that he would testify truly, did unlawfully, wilfully, and knowingly, and contrary to said oath, state matter which he did not believe to be true, that is to say:

2. At the time and place aforesaid, the Court and jury were engaged in the trial of the aforementioned Indictment, wherein WILLIAM WALTER REMINGTON, the defendant herein, was charged with having committed perjury when he testified falsely and contrary to an oath before a Grand Jury sitting in and for the Southern District of New York, in denying that he had ever, at any time, been a member of the Communist Party.

3. Whether or not WILLIAM WALTER REMINGTON had ever been a member of the Young Communist League, associated with it, or aware of its existence at Dartmouth College, was a matter material to said trial.

4. At the time and place aforesaid, WILLIAM WALTER REMINGTON, appearing as a witness, under oath, testified falsely with respect to the aforesaid material matter, as follows:

"Q. Now you have testified here regarding the Young Communist League and your membership in it or knowledge or association with it. A. No.

Q. You have not, you say? A. I have testified about my lack of membership in it, my lack of association with it.

Q. Is it your present testimony that you had no knowledge of the existence of the Young Communist League at Dartmouth until your preparation for your defense in this case? A. I had no knowledge."

The aforesaid testimony of WILLIAM WALTER REMINGTON, as he then and there well knew and believed, was untrue in that he knew of the existence of the Young Communist League at Dartmouth prior to the filing of Indictment No. C 132-344 (Title 18, Section 1621, United States Code).

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## APPENDIX B

Petition for Certiorari

(Bound separately)

No. 387

FILED
DEC 6 1951
CHARLES ELMORE CROPLEY
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

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WILLIAM WALTER REMINGTON, PETITIONER

v.

UNITED STATES OF AMERICA

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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MEMORANDUM FOR THE UNITED STATES IN REPLY TO PETITIONER'S RESPONSE TO THE GOVERNMENT'S MOTION FOR LEAVE TO APPLY TO THE DISTRICT COURT FOR LEAVE TO DISMISS THE INDICTMENT.

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IN THE SUPREME COURT OF THE UNITED STATES

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WILLIAM WALTER REMINGTON, PETITIONER

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ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
SECOND CIRCUIT

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# MEMORANDUM FOR THE UNITED STATES IN REPLY TO PETITIONER'S RESPONSE TO THE GOVERNMENT'S MOTION FOR LEAVE TO APPLY TO THE DISTRICT COURT FOR LEAVE TO DISMISS THE INDICTMENT

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Rule 48(a) of the Federal Rules of Criminal Procedure provides:

> The Attorney General or the United States Attorney may by leave of court file a dismissal of an indictment, information or complaint and the prosecution shall thereupon terminate. Such a dismissal may not be filed during the trial without the consent of the defendant.

Petitioner opposes the Government's motion for leave to apply to the District Court for leave to dismiss the indictment on two grounds: first, that under the second sentence of Rule 48(a), the indictment cannot be dismissed without his consent (Response 6-8); and, second, that in any event, in the circumstances of this case, leave to dismiss should be denied (Resp. 8-22).

We think petitioner's response to our motion misconceives the nature of our request and, moreover, that at least his second ground of objection to dismissal is prematurely presented in this Court. The authority under Rule 48(a) to grant or deny leave to dismiss an indictment is vested in the District Court. Cf. Bryan v. United States, 338 U.S. 552, 558-559. The Government is not asking this Court for leave to dismiss the indictment; all we ask is that the Court grant us

leave to apply to the District Court for leave to dismiss it. As explained in our motion (pp. 3-4), we seek such leave of this Court only because the pendency here of the petition for a writ of certiorari "makes it uncertain whether the District Court may grant leave to dismiss while the case is pending in this Court, without leave of this Court." In other words, the only purpose of our motion is to remove a possible jurisdictional obstacle to the otherwise undoubted authority of the District Court to grant leave to dismiss. If the leave we ask here is granted, it will be open to petitioner to make his objections to dismissal when the Government applies to the District Court for leave to dismiss. We shall nevertheless show that his objections are altogether untenable.

I

RULE 48(a) DOES NOT REQUIRE PETITIONER'S CONSENT TO DISMISSAL OF THE INDICTMENT

The second sentence of Rule 48(a) provides that, "Such a dismissal may not be filed during the trial without the consent of the defendant." By its express terms, the Rule requires the defendant's consent to a dismissal only when such dismissal is sought "during the trial." Obviously, this case is not now at that stage. With the reversal of petitioner's conviction, the situation is as though he had never been tried, and the Government, with leave of the District Court, is entitled to dismiss the indictment without petitioner's consent.

Petitioner argues, however, that the present case is within the spirit of the Rule. The second sentence of the Rule was responsive to the Fifth Amendment's prohibition against double jeopardy, as indicated by the cases cited in the Note to the Rule: (Confiscation Cases, 7 Wall. 454, 457; United States v. Shoemaker, 27 Fed. Cases No. 16279 (C.C. Ill.)). Of course, once the "trial" has commenced (whether by empanelling the jury or by hearing evidence need not be determined here), the defendant has been placed in jeopardy; and the

indictment cannot be dismissed without barring a second prosecution for the same offense, unless the dismissal (or nolle prosequi) is had with the consent of the defendant. That is what United States v. Shoemaker holds. But the same cases which are cited in the Note to Rule 48(a), supra, for the proposition that this sentence of the rule is declaratory of existing law, also reiterated the right of the Government to dismiss an indictment prior to the commencement of the trial.[1/]

Nothing is better established than that the retrial of a defendant who secures a reversal of his conviction does not subject him to double jeopardy. Indeed, as recently as Bryan v. United States, 338 U.S. 552, this Court specifically held that even where a defendant obtained a reversal of his conviction "because the evidence is not sufficient to obtain a conviction," the double jeopardy rule did not require the appellate court to direct the entry of a judgment of acquittal.

Thus, by his successful appeal, petitioner lost the rights relating to double jeopardy which he acquired when his trial commenced. Trono v. United States, 199 U.S. 521, 533; United States v. Ball, 163 U.S. 662, 671. He may now be tried again under the first indictment, just as though the first trial had not taken place. For the same reason, the Government has the same right to refrain from a retrial of

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1/ This right was modified in the first sentence of Rule 48(a) to require leave of the court.

petitioner without his consent as it had to refrain from bringing him to trial the first time. Since the sole purpose of the second sentence of Rule 48(a) is to protect a defendant against dismissal of the indictment and a possible second prosecution after he has been placed in jeopardy by the commencement of the trial, his consent to such dismissal is no longer required when that jeopardy is wiped out by his successful appeal. In other words, petitioner's consent to the dismissal of the indictment is not now required by the Rule, just as it was not required before he was placed in jeopardy at the trial.

Thus the language, history and purpose all combine to show that the Rule is inapplicable in the present situation.

II

PETITIONER HAS INTERPOSED NO VALID OBJECTION TO THE GOVERNMENT'S MOTION

Petitioner contends that the Government should not be permitted to dismiss the first indictment, because such dismissal "will gravely prejudice petitioner's rights" (Resp. 8). We submit that petitioner has no rights which will be prejudiced by such dismissal.

First, petitioner asserts that dismissal will deprive him of an opportunity to try to persuade this Court that the indictment was rendered invalid by the allegedly illegal actions of the United States Attorney before the grand jury (Resp. 11-13). The most that petitioner could hope to accomplish by such a showing would be dismissal of the indictment. If the indictment is dismissed, as we propose, petitioner's only legitimate objective on this score will have been accomplished.

Petitioner further argues that because of such alleged infirmities in the original indictment the entire trial was a deprivation of due process of law and, consequently, statements made at the trial cannot form the basis of a perjury prosecution (Resp. 12). This Court disposed of a similar contention in United States v. Williams, 341 U.S. 58, 67-68, as follows:

> * * * where the court in the trial where the alleged perjury occurred had jurisdiction to render judgment on the merits in those proceedings, defects developed dehors the record or in the procedure, sufficient to invalidate any judgment on review, do not make a subsequent conviction for perjury in the former trial impossible.
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> Where a federal court has power, as here, to proceed to a determination on the merits, that is jurisdiction of the proceedings. The District Court has such jurisdiction. Though the trial court or an appellate court may conclude that the statute is wholly unconstitutional, or that the facts stated in the indictment do not constitute a crime or are not proven, it has proceeded with jurisdiction and false testimony before it under oath is perjury.

There is no contention that the trial court did not have jurisdiction to proceed to a determination on the merits. Accordingly, petitioner can be prosecuted for testifying falsely during the trial (341 U.S. at 65-69), irrespective of the validity of the prior indictment.

Petitioner also contends that dismissal of the indictment will preclude him from obtaining from this Court an adjudication that he is entitled to a judgment of acquittal. Clearly, a reversal by this Court on grounds of insufficiency or invalidity of the indictment would not produce a judgment of acquittal, but merely a dismissal of the indictment. Nor would reversal on the ground that the court below misconstrued the perjury rule of evidence result in a judgment of acquittal. The Government would still be entitled to an opportunity to prove by more direct evidence that petitioner had joined the Communist Party; the claimed deficiency in the proof upon that theory is one that, by its very nature, is curable upon a new trial. The Court of Appeals has already so held in finding that the trial court misapplied the perjury rule, and Bryan v. United States, 338 U.S. 552, 560, makes it clear that the remand by the Court of Appeals permitting a new trial was a "just and appropriate order which the Court of Appeals was authorized to enter by 28 U.S.C. 2106." If it be assumed that this Court should accept petitioner's theory as to the precise nature of the error in the trial court, rather than that of the court below, the appropriate disposition would still be a remand permitting a new trial; and the Government would still be entitled to a chance to retry the case if it could meet the evidentiary requirements.

The core of petitioner's argument is that, in the circumstances of this case, a judgment of acquittal under the first indictment might preclude his conviction under the second indictment for perjury committed during his trial under the first, and therefore that he might escape the burden of a second trial. If, as we shall show, a judgment of acquittal could not have that effect, then petitioner has failed to make any showing that he will be prejudiced if the Government is allowed to dismiss the first indictment.

Again, United States v. Williams, 341 U.S. 58, is controlling. There, this Court held that an acquittal of defendants on a charge of aiding and abetting the beating of prisoners for the purpose of securing confessions did not bar a prosecution of those defendants for perjury in testifying that they did not see the beating. For "An acquittal of such a crime or of aiding and abetting was certainly not a determination that Ford, Bombaci or Yuhas did not see Williams assaulting the prisoners" (341 U.S. at 65). Thus, even if petitioner were acquitted of the charge of perjury in having testified before the grand jury that he had never been a member of the Communist Party, such acquittal would not bar his prosecution for committing perjury at his trial in testifying that he had not attended Communist Party meetings, paid Party dues, or asked others to join the Party, that he had not been a member of, or associated with, or aware of the existence of, the Young Communist League at Dartmouth College, and that he had not given anyone not entitled thereto information to which he had access as a government employee.

Here, as in United States v. Williams, supra, even if petitioner were acquitted under the first indictment, his trial under the second indictment would not constitute double jeopardy, since "It is only an identity of offenses which is fatal." Pinkerton v. United States, 328 U.S. 640, 644. As this Court stated in Williams (at p. 62):

> It would be no service to the administration of justice to enlarge the conception of former jeopardy to afford a defendant immunity from prosecution for perjury while giving testimony in his own defense.

As in Williams, the question here is whether, under res judicata principles, an acquittal on the first indictment would constitute "a determination favorable to petitioner of the facts essential to conviction" under the second perjury indictment.

Acquittal on the first indictment would constitute a determination that petitioner had not falsely testified before the grand jury in stating that he had never been a member of the Communist Party. We may assume that such an acquittal would be res judicata, for example, as to a subsequent charge that petitioner had falsely denied that he was an official of the Communist Party. Assuming that only members may be officers of the Party, it could be argued that a determination that one has truthfully denied membership precludes a contention that one has falsely denied being an officer. Cf. Sealfon v. United States, 332 U.S. 575, 578-580. However, such an acquittal could not be conclusive as to any statement of fact which ~~was not an essential element of, or~~ did not include as an essential element, the statement of fact the truth of which was determined by the judgment of acquittal.

Here, no one of the false statements charged in the second indictment, with the possible exception of that relating to payment of Party dues, could be regarded as having been determined favorably to the petitioner by an acquittal on the earlier charge that he had falsely denied membership in the Communist Party. For example, such an acquittal is not a determination that petitioner never knowingly attended Communist Party meetings. Clearly, attendance at Communist Party meetings is no more precluded by non-membership in the Party than observing a beating is precluded by a determination that the

observer did not aid and abet the beating. One might attend meetings for curiosity's sake, or to gain information, or on the invitation of a friend. Similarly, petitioner could have had knowledge of the existence of the Young Communist League at Dartmouth College, or even have associated with it, without having been a member of the Party. And he could have given away secret information for many reasons (e.g., for money) unrelated to membership in the Communist Party. The Williams case thus thoroughly disposes of petitioner's contention that an acquittal on the original charge would bar his prosecution under the new indictment.

Petitioner seeks to distinguish United States v. Williams, supra, upon the ground, unsupported by any authority, that one cannot be indicted for perjury committed during a trial on charges of perjury (Resp. 16). We think it clear that a defendant does not have a "right" to commit perjury during his trial on charges of perjury, any more than he may commit perjury with impunity during his trial on any other charge. Petitioner conjures up limitless possibilities of perjury prosecutions based upon repeated denials of charges of perjury. But of course, a defendant does not have to commit perjury in giving testimony in his own defense. Petitioner, in effect, makes the startling assertion that he does, for he says that "as often as the charge is repeated, if he has the hardihood to defend himself, he must repeat this denial, and of course that means also that he must also deny the details of the charge; otherwise he must admit it" (Resp. 21). But those involved in the Williams case were in exactly the same position as petitioner, for certainly it was as necessary to their defense against a charge of abetting a beating to deny that they saw the beating, as it was for petitioner to deny the facts involved in the second indictment.

The perjury statute presents no greater opportunity for unfounded prosecutions than do most criminal statutes. And the

possibility that a second perjury prosecution may sometimes result from a perjury trial is no good reason for encouraging wholesale perjury in perjury cases.

Petitioner contends that not "more than a single crime of perjury can be predicated on statements under oath relating to a single subject, made during the course of a single continuous investigation" (Resp. 17-22). Petitioner would apply this bald statement by assuming that the instances of perjury charged in the second indictment relate solely to the issue of his alleged membership in the Communist Party, denial of which was the basis of the first indictment; he also asserts that during the grand jury proceedings leading to the first indictment, he was asked substantially the same questions and gave substantially the same answers as are set forth in the second indictment as perjuries committed during the trial under the first. He concludes, therefore, that the alleged rule should preclude more than a single prosecution based upon the matters as to which he was questioned before the grand jury or during the subsequent trial.

As petitioner admits, his cited authorities "relate to proceedings at a single hearing, or at a single trial" (Resp. 19). Indeed, such of the cited cases as State v. Shannon, 136 Me. 127, 902, and Black v. State, 13 Ga. App. 541, 79 S.E. 173, 174, emphasize that it is the identity of the proceeding and of the oath taken by the defendant that constitutes as a single offense of perjury all of the falsehoods uttered by him. The allegedly perjurious statements set forth in the second indictment are, as we have shown, different from the one on which the first indictment was founded, and were made in separate proceedings under separate oaths. The charges made in the second indictment could not have been contained in the first, for the offenses alleged in the second had not been committed when the first one was returned. Petitioner's contention that all his statements constitute only one offense would have the effect of granting a witness charged with having once sworn falsely immunity from any further prosecution for later false testimony.

Petitioner's argument that he cannot be indicted for alleged perjuries committed during his trial because the same alleged perjuries were also committed before the grand jury, would have curious consequences. It would mean that one tried on a charge of perjury before a Congressional committee would be immune from prosecution for repeating the same or related perjuries at his trial. Such anomalous results only emphasize that perjury prosecutions are independent of the proceedings out of which they arise. Thus, as in the present case, it is irrelevant that there was a relationship between two proceedings in each of which perjury is alleged to have occurred. Rather, each perjury prosecution is a separate vindication of the "probable wrong done the administration of justice by false testimony." United States v. Williams, 341 U.S. at 68.

Moreover, whatever may be the rule in some states, it is clear that in the federal courts separate allegedly false statements even under the same oath may be charged as separate counts in an indictment for perjury. Seymour v. United States, 77 F. 2d 577 (C.A. 8); United States v. Cason, 39 F. Supp. 731, 734 (W.D. La.).

Finally, we suggest that even if petitioner had been or were to be acquitted under the first indictment, the whole question whether or to what extent such an acquittal would be res judicata as to the issues presented by the second indictment is raised prematurely at this time. Petitioner is in effect seeking a declaratory judgment, heretofore unknown to the criminal law, that under the doctrine of res judicata an acquittal on the first indictment would preclude his conviction under the second. The question is premature, in that the essentially factual issues of res judicata can be elucidated on motion or trial proceedings under the second indictment, and in that petitioner may be acquitted or may obtain dismissal with respect to some or all of the counts. Prematureness is emphasized by the fact that if the courts below had acquitted petitioner under the first